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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 886

PAUL M. HUGHES,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner PAUL M. HUGHES prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the refusal of the United States District Court for the Southern District of New York to grant petitioner's motion, made prior to sentence, pursuant to Rule 32(d) Fed. R. Crim. P., to withdraw his plea of "guilty" to the 32nd count of his indictment and enter a plea of "not guilty", and, thus, affirming the judgment of conviction and sentence on such plea of "guilty" for conspiring to violate the Federal Securities Laws, Title 18, U. S. C. § 1341, and Title 15, U. S. C. § 77.

Opinions Below

In the Appendix are reprinted the opinion of the Court of Appeals (P1-16), 325 F. 2d 789*, and the opinion of the United States District Court for the Southern District of New York, 223 F. Supp. 477 (P17-38).

Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on January 9, 1964, and denied rehearing on January 31, 1964. The jurisdiction of this Court is invoked under Title 28, U. S. C. § 1254(1).

Questions Presented

1. Whether a defendant is entitled to change his guilty plea prior to sentence even though it was entered "voluntarily".

2. Whether a defendant is entitled to change his plea prior to sentence where:

a) the government does not claim that the defendant's assertion of innocence is frivolous, or that the granting of the motion would in any way be prejudicial to it or the courts, and

b) the government told the defendant that his "full cooperation" and plea of "guilty" would result in the government making a favorable statement at his sentence, and

* References to the Petitioner's Appendix herein are designated by a "P", followed by the page number. References to Petitioner's Appendix in the Court of Appeals are designated by an "A", followed by the page number. References to the record on appeal are designated by an "R", followed by the page number. References to the Government's Appendix in the Court of Appeals are designated by a "G", followed by the page number.

c) the government refuses to make a favorable statement although the defendant claims to have "fully cooperated".

3. Whether a trial judge is disqualified when he testifies, but later decides the case in a manner so as to make his testimony not relevant to the primary issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Pertinent portions of the United States Constitution, Amendment V, and the statutes involved, namely Rule 32(d), Federal Rules of Criminal Procedure and 28 U. S. C. §455 are reprinted in the Appendix (P39).

Statement of the Case

1. When the petitioner was in his middle twenties he went to work for Alexander Guterma as a salaried employee. Well after he had left Mr. Guterma's employ, and on November 18, 1960, the petitioner found himself under indictment along with Mr. Guterma. Before this indictment, petitioner had enjoyed a spotless record. He pleaded "not guilty" on December 12, 1960 (A1-2).

Petitioner's attorney and the Executive Assistant United States Attorney, in charge of the case, thereafter met at least six times in person and spoke to each other over the telephone about thirteen times (R164-7, 385).

The District Court found that,

> "Among other things, they explored the possibility of a change in plea by the defendant; they discussed the count or counts to which the defendant might enter his guilty plea; they delineated the salient positions of the United States Attorney and the defendant relative to each other after the defendant shall have pleaded guilty in the event the

> defendant did plead guilty, such as, the question of adverse publicity in connection with the defendant's change of plea, the attitude of the Government with respect to possible other criminal proceedings, the extent of the defendant's possible cooperation with the Government and the Government's stand on the day of sentencing in the light of such cooperation as the defendant shall have actually given by that time." (P17)

The lower Court also found that

> "...the United States Attorney's Office advised the defense that, if the defendant did cooperate, the extent of such cooperation would be called to the attention of the sentencing judge; that, if the defendant cooperated fully, the United States Attorney's Office would present the pertinent facts of such cooperation without any recommendation but in such a manner as to indicate to the sentencing judge that the United States Attorney's Office was not pressing for a jail sentence; that the nature and extent of any sentence was a matter within the exclusive province of the Court; and that no promise or guaranty of any specific sentence could be given to the defendant; . . . " (P25)

On April 3, 1961 petitioner changed his plea before Judge Metzner who asked him, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, whether his plea of "guilty" was based on any promises or offers of the United States Attorney. Since both his counsel and the Government had stressed that the aforesaid representation could not be deemed a promise of a specific sentence, he naturally answered "No" to the question* (A94).

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* It is important to note that although the government conceded the making of the representation concerning a favorable statement on sentence, at the hearing before Judge Metzner government counsel did not step forward following petitioner's answer to inform Judge Metzner about the various matters that were discussed with petitioner's counsel during the four months of negotiations preceding the change of plea to "guilty".

For the next two years the defendant testified for the government against Mr. Guterma's associates in the famous "United Dye" indictment and trial (*United States* v. *Garfield*, SM, pp. 11973-12458).* The Judge below presided at that trial and consequently knew this personally as well as judicially. In the course of the trial the judge remarked that, in his view, the petitioner was making a sincere effort to be truthful (*Garfield*, SM, p. 12161) and the prosecutor extolled the petitioner's truthfulness to the jury (*Garfield*, SM, p. 25854).

The United Dye trial came to a conclusion on February 6, 1963 (A90). Shortly thereafter Assistant United States Attorneys Gerald Walpin and Donald Cohn asked to speak to the petitioner without his counsel being present.

An account of what took place at that bizarre meeting is set forth in detail in the opinion below (P22-4).

The Court below found that there were fundamental differences between the government and the petitioner as to the nature and extent of petitioner's actual cooperation with the government (P17-18). Concerning this dispute the court ruled that

> "To permit a defendant who has pleaded guilty to withdraw his plea merely because he and the United States Attorney disagree over the extent to which he has cooperated or is able to cooperate with the Government, in the circumstances of this case would inject a disruptive element into the judicial administration of criminal justice and create an issue that by its very nature should not be the subject of a plenary hearing." (P25)

Moreover the court rejected any evidence offered to show that the petitioner had fully cooperated, ruling:

> "A full dress trial of a controverted issue whether a defendant, after his guilty plea, has fully

* 61 Cr. 671, 694 (S. D. N. Y.), appeal pending, No. 28030 (2d Cir.)

cooperated with the United States Attorney in pending inquiries, would require the Court to probe into the executive management of criminal investigations, grand jury proceedings and matters of administrative judgment. Such judicial intervention (including a hearing) presents the substantial risk of premature disclosure of matters under investigation and the consequent impairment of criminal law enforcement.

"Unless necessary to promote the proper [1595] administration of justice or to safeguard a defendant's rights, the Court should not inject itself into the pre-indictment investigative functions of the United States Attorney." (P25-6)

2. Before the petitioner's sentence appeared on the calendar in Room 318 (where defendants are sentenced if the case has not been sent out for trial (A40-1)*) petitioner's counsel mentioned to the government attorneys that he had an agreement with prior government counsel to the effect that the government would consent to one or two adjournments of the sentence in order that the favorable statement not be made to the one or two judges whose reputation for harshness created a risk that the statement would not have the desired effect (R1010-14). Although there was some dispute as to this, petitioner's counsel said that, in any event, the whole matter would probably be academic since the judges likely to be scheduled to sit in Room 318 would probably be satisfactory to the defense (R724, 739, 1014).

Thereafter, and before the date set for sentence, the government counsel telephoned Judge Herlands at home and asked whether he would be agreeable to the petitioner's sentence being referred to him from the judge sitting in Room 318 (A90). Government counsel never mentioned to petitioner's counsel that he intended to call Judge Herlands, and he mentioned nothing to Judge Herlands of his

* Neither the petitioner on the remaining 31 counts of the indictment, nor any of his co-defendants have been tried.

conversation with petitioner's counsel concerning the so-called "bypassing agreement" (A101).

At the hearing below Judge Herlands was requested to, and did, testify concerning his telephone conversation with government counsel concerning the referral of the sentence to him (A87-93). He testified that when he spoke to government counsel he told them that he thought that it would be advisable that the sentence be referred to him (A89-90).

The lower court held that what passed between the Executive Assistant United States Attorney and petitioner's counsel concerning adjournments of the sentence did not constitute an agreement to bypass harsh sentencing judges (P31), and stated that:

> "In view of the foregoing, it is immaterial and irrelevant that Judge Noonan, sitting in Room 318, referred the sentencing to this Court upon the application or suggestion of the United States Attorney." (P35)

Consequently, Judge Herlands held that his testimony, material only to the repudiation of such an agreement, if there was one, became immaterial by dint of his finding that there was no agreement. He therefore did not disqualify himself pursuant to Title 28 U. S. C. § 455.

The Court of Appeals held that his failure to disqualify himself did not constitute an abuse of discretion (P 16).

Reasons for Granting the Writ

1. Congress has singled out the procedure governed by Rule 32(d), Fed. R. Crim. P. for special attention. The only restriction on this Court's powers to promulgate rules was a protective restriction affecting the withdrawal of "guilty" pleas. 18 U. S. C. 3771-2. *Kadwell* v. *United States*, 315 F. 2d 667 (9th Cir. 1963).

This Court has yet to announce the standard applicable to withdrawal of pleas before sentence. The withdrawal

of a plea after sentence has been held by this court to require a showing that the plea did not have the character of a voluntary act. *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962); *Kercheval* v. *United States*, 274 U. S. 220 (1927). The Court of Appeals for the Second Circuit has affirmed the imposition upon the petitioner of the post sentence burden although his motion was made prior to sentence.

In other Circuits, before sentence, the claim of innocence, so long as it is not frivolous, is sufficient to entitle a defendant to withdraw a "guilty" plea so long as no prejudice to the government or courts would result from permitting the defendant to go to trial. *Kadwell* v. *United States*, 315 F. 2d 667 (9th Cir. 1963); *United States* v. *Roland*, 318 F. 2d 406 (4th Cir. 1963); *Gearhart* v. *United States*, 272 F. 2d 499 (App. D. C. 1959); *United States* v. *Lias*, 173 F. 2d 685 (4th Cir. 1949); *Poole* v. *United States*, 250 F. 2d 396 (App. D. C. 1957). The basis for this liberalism is best stated in the opinion of the 4th Circuit in *Lias* affirming the District Judge, who held simply and soundly that he could not permit a man to be sent to prison on a guilty plea who claimed to be innocent (p. 687).

The Second Circuit held that "the allegation of innocence is not sufficient" (P14), and that some unfair inducement must be shown. Both the District Court and the Court of Appeals stressed the compliance with Rule 11 when the defendant pleaded guilty (P18, 15). Rule 11, however, involves the requirement that a guilty plea be voluntary, and compliance with it is relevant only where it is claimed that the plea lacked the quality of a voluntary act. Such an issue is only material if Rule 32(d) is involved as a post-sentence remedy since a violation of Rule 11 is itself the basis for relief. *United States* v. *Lester*, 247 F. 2d 496 (2d Cir. 1957). Obviously it would be manifest injustice to deny a change of plea that did not have the character of a voluntary act. *Machibroda* v. *United States*, *supra*. In concentrating upon the wilfullness *vel non* of the

plea for their *ratio decidendi*, both the District and Circuit Courts insinuated the post-sentence burden into this pre-sentence case.

Another departure from the rule prevailing in other Circuits is the Second Circuit's decision that actual guilt or innocence is relevant in a pre-sentence motion (P13). Cases in other circuits do not deem that issue relevant in a Rule 32(d) motion beyond the question of whether the claim of innocence is frivolous. *Kadwell* v. *United States, supra; Gearhart* v. *United States, supra.*

The division between the Second Circuit and the others on this most important question affecting the vital right to a trial by jury should move this Court to grant the petition and settle these very important issues.

2. This Court has held that it is a "spectacle" which violates due process for a judge to present testimony on which he must finally pass. *In re Murchison*, 349 U. S. 133, 139 (1955).

In the proceeding below, the judge gave testimony that was material to the issue of the repudiation of the "bypassing agreement" (A87-93). Though informed at the outset that he might have to be called upon to testify (A35), he nonetheless continued with the hearing. When the hearing was over, the court held that the petitioner had failed to establish the existence of the by-passing agreement thus making his evidence of its repudiation immaterial (P31, 35). Consequently, the court reasoned, it was not disqualified under Title 28 U. S. C. § 455.

The Court of Appeals held that in so waiting until the end of the case, the lower court did not abuse its discretion (P16).

Yet, the pressure under which a judge must find himself to save his jurisdiction deprives the parties of a fair hearing. Clearly if the judge below had found that a meeting of the minds had been reached by counsel concerning the privilege of avoiding harsh sentencing judges an embar-

rassing delay would have resulted because the judge would then have become a material witness and he would have to disqualify himself. To wait until the end of the hearing to reach this problem subjects the parties to having their rights determined by a trier who is under personal pressures *dehors* the issues.

Section 455, involving, as it does, not only sound administrative rules, *United States* v. *Halley*, 240 F. 2d 418, 419 (2d Cir. 1957) cert. denied 353 U. S. 967 (1957), but due process requirements as well, *In re Murchison, supra*, does not permit of the discretion accorded to it by the Second Circuit. See, Report of the Special Committee on the Propriety of Judges appearing as Witnesses, 36 A. B. A. Jour., 630, 631.

CONCLUSION

For the reasons stated above, it is prayed that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit herein.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 195—September Term, 1963.

(Argued December 9, 1963 Decided January 9, 1964.)

Docket No. 28303

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

PAUL M. HUGHES,

Defendant-Appellant.

Before:

CLARK,* SMITH and HAYES,

Circuit Judges.

Appeal from a judgment of conviction entered by the United States District Court for the Southern District of New York, William B. Herlands, *Judge*, following a plea of guilty and the denial of a motion to withdraw that plea.

Judgment affirmed.

DONALD J. COHN, Ass't United States Attorney, New York City (Robert M. Morgenthau, United States Attorney, and James M. Brachman, Ass't United States Attorney), *for the United States.*

BRUNO SCHACHNER, New York City, *for Appellant.*

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* Judge Clark heard oral argument and participated in the decision in this case, voting to affirm. He died before the opinion was written.

HAYS, *Circuit Judge*:

Defendant Hughes appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York by Judge William B. Herlands on a plea of guilty to the final count of a 32 count indictment charging Hughes and others with violations of the securities laws, mail fraud, and conspiracy. Hughes had originally pleaded not guilty. He later changed his plea to the conspiracy count of the indictment, pleading guilty to that count alone. After the case had been assigned to Judge Herlands for sentencing Hughes moved, pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure,[1] to withdraw his plea of guilty. The grounds of his motion were that he was in fact innocent and that certain representations which had been made to secure his testimony in a related stock swindle case, *United States* v. *Garfield* [*United Dye Corp.*], 61 Cr. 671, 694 (S. D. N. Y.), appeal pending, No. 28030 (2d Cir.), and on which he had relied as an inducement to plead guilty, had been repudiated by the government.[2] After a six-day hearing, Judge Herlands denied the motion and sentenced Hughes to eighteen months imprisonment. We affirm.

In affidavits annexed to his motion to withdraw his guilty plea, Hughes and his two attorneys alleged that Hughes believed he was innocent of the charges in the indictment.

---

[1] "(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." Fed. R. Crim. P. 32(d).

[2] Cooperation with government authorities is not alone sufficient to require the granting of a motion to withdraw a guilty plea, *United States* v. *Nagelberg*, 323 F. 2d 936 (2d Cir. 1963). However, where defendant shows that his cooperation was induced by government representations which were repudiated, the motion should be granted. *United States* v. *Lester*, 247 F. 2d 496, 501 (2d Cir. 1957).

At the hearing before Judge Herlands, government counsel testified that Hughes had never maintained his innocence during any of their many conferences and that indeed Hughes had admitted his guilt in response to questions put to him as preparation for anticipated cross-examination. Hughes and his counsel were permitted to contradict that testimony but Hughes was not permitted to testify regarding his present belief that he was innocent. Resolving the conflict in testimony in favor of the government, Judge Herlands found:

> "1. That the defendant pleaded guilty before Judge Metzner on April 3, 1961, because he felt and knew he was guilty and because, acting on the advice of competent counsel, he concluded it was to his own best interest not to stand trial but to attempt to mitigate or extenuate his guilt by agreeing to cooperate with the Government.
>
> 2. That neither the defendant nor his attorney has maintained that he is innocent of the charge to which he pleaded guilty • • • [Record citations omitted], that, on the contrary, the defendant admitted his guilt not only by pleading guilty before Judge Metzner but also by reaffirming his guilt in his answer to the specific question put to him by Assistant United States Attorney Walpin in the course of preparing against anticipated cross-examination in the *Udy case.*" [Record citations omitted.]

Defendant objects that it was improper for the court to determine that he had never maintained his innocence in view of the allegations of innocence in his affidavits and the action of the court in prohibiting testimony as to his present state of mind. We conclude that no error was committed.

As is apparent from a reading of the opinion as a whole, Judge Herlands sought primarily to determine whether Hughes had asserted his innocence at or about the time of his guilty plea, since that fact, if established, would have supported his claim that his plea had been induced by gov-

ernment representations rather than by a consciousness of guilt. Thus, we think the phrase "has maintained" in finding 1 must be read as referring to the prior period only. Hughes' present self-serving protestations of innocence were, of course, not probative of his former state of mind and thus were properly excluded on that issue.

Defendant contends, however, that his present claim of innocence was not accorded the significance to which it is entitled. He points to decisions stating that, although withdrawal of a guilty plea after sentence should be permitted only "to correct manifest injustice," such a change of plea should be freely allowed when sought before sentence is imposed, see, e.g. *Kercheval* v. *United States*, 274 U. S. 220, 224 (1927); *Kadwell* v. *United States*, 315 F. 2d 667, 670-71 (9th Cir. 1963); *United States* v. *Lias*, 173 F. 2d 685, 688 (4th Cir. 1949), and argues that leave to withdraw a guilty plea *must* be granted when a defendant's claim of innocence is not frivolous and it will not be inequitable to the government—because of intervening destruction of evidence or otherwise—to afford a defendant a trial, see *Gearhart* v. *United States*, 272 F. 2d 499 (D. C. Cir. 1959) (defense of insanity).

Denial of a motion to withdraw a guilty plea, however, is reversible only if there has been an abuse of discretion. *United States* v. *Smiley*, 322 F. 2d 248 (2d Cir. 1963); *United States* v. *Lester*, 247 F. 2d 496, 500 (2d Cir. 1957). And although a defendant is not entitled to gamble upon the outcome of a trial and thus must at least deny that he is guilty. *United States* v. *Paglia*, 190 F. 2d 445, 447-48 (2d Cir. 1951); accord *United States* v. *Nagelberg*, 323 F. 2d 936 (2d Cir. 1963); *United States* v. *Norstrand Corp.*, 168 F. 2d 481 (2d Cir. 1948), an allegation of innocence is not sufficient to compel the granting of a motion to withdraw a guilty plea, *United States* v. *Lester*, *supra* at 501.

Appellant claims that the government induced him to enter a guilty plea by promising to make a statement to

the sentencing judge which would be favorable to him and by promising that he would be permitted to by-pass judges whom he believed to be severe in imposing sentences.

At the time he entered his guilty plea appellant was fully questioned by Judge Metzner as to whether any inducements had been offered to him to persuade him to change his plea. He denied such inducements. The testimony at the hearing on this motion indicated that the appellant made similar denials on at least two other occasions, and, in fact, he seems to have repeated the denial when questioned by Judge Herlands on the hearing below.

The weight to be accorded this testimony and the conflicting testimony for Hughes, and the credibility of the witnesses are primarily entrusted to the judge who hears the evidence. His finding "that nothing was promised or offered to [Hughes] by the United States Attorney's office to induce him to change his plea from not guilty to guilty," is, in the light of the evidence, not clearly erroneous.

Finally, defendant contends that, pursuant to 28 U. S. C. § 455 (1958),[3] Judge Herlands should have disqualified himself when it appeared that his testimony was material to one of the issues raised during the hearing. Although Judge Herlands did make a declaration for the record, he stated, and we agree, that it was not relevant to the primary issues in the hearing. However, defendant argues that under *United States* v. *Halley*, 240 F. 2d 418, 419 (2d Cir.), cert. denied, 353 U. S. 967 (1957) and *United States* v. *Valentino*, 283 F. 2d 634 (2d Cir. 1960), Judge Herlands should have

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[3] "§ 455. *Interest of justice or judge.*

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." 28 U. S. C. § 455 (1958).

disqualified himself when it appeared he *might* be a witness. But when the hearing started defendant's counsel was very equivocal in suggesting the possibility that Judge Herlands might be asked to testify. Moreover, the statements in the cases upon which defendant relies were rather in the nature of advice to the lower courts on remand than direct holding on the points involved. Since the literal terms of 28 U. S. C. § 455 (1958) require disqualification only if the judge *is* a witness, we think the *Halley* and *Valentino* cases state what is merely a rule of good practice, the violation of which does not require the finding of an abuse of discretion when in fact the judge does not participate as a material witness, and there are considerations of efficient judicial administration which favor his presiding, such as, in this case, Judge Herlands' familiarity with matters relevant to sentencing through having presided over the *United Dye* case. See *Dillon* v. *United States*, 307 F. 2d 445, 453 (9th Cir. 1962) (Barnes, *J.*, dissenting).

Affirmed.

Opinion of the District Court

[1580]

This is a motion by the defendant pursuant to Rule 32(d), F. R. Crim. Pro., for leave to withdraw his plea of guilty to Count 32 (the conspiracy count) of Indictment Number 60 Cr. 980 and to enter a plea of not guilty. This motion was brought on by an order to show cause, dated April 26, 1963, returnable May 1, 1963.

On May 1, 1963, the Court ordered a full hearing on the motion. Testimony was taken on May 1, 20, 21, 23, 24, 25 and 28, 1963.

Indictment No. 60 Cr. 980, filed on November 18, 1960, named the defendant in 32 counts.

On December 12, 1960, the defendant pleaded not guilty. In December, 1960, Thomas A. Bolan, Esq., was retained as his attorney by the defendant.

Thereafter, Jerome J. Londin, Executive Assistant United States Attorney, (who was in charge of the case) and Bolan had a number of conversations. Among other things, they explored the possibility of a change in plea by the defendant; they discussed the count or counts to which the defendant might enter his guilty plea; they delineated the salient [1581] positions of the United States Attorney and the defendant relative to each other after the defendant shall have pleaded guilty in the event the defendant did plead guilty, such as, the question of adverse publicity in connection with the defendant's change of plea, the attitude of the Government with respect to possible other criminal proceedings, the extent of the defendant's possible cooperation with the Government and the Government's stand on the day of sentencing in the light of such cooperation as the defendant shall have actually given by that time.

I.

There are fundamental differences between the Government and the defense as to (*inter alia*) the nature and extent of the cooperation that the defendant was supposed to give

to the Government; and as to the nature and extent of the defendant's actual cooperation with the Government and the manner in which the Government has conducted itself in seeking to obtain the defendant's cooperation.

There is also a basic controversy between the Government and the defense as to whether the defendant was induced to plead guilty by virtue of an alleged assurance, promise or representation by [1582] the Government that the defendant would be given the privilege of obtaining one or more adjournments of the sentencing in Room 318 (where the criminal calendar and criminal motion part of the court is ordinarily held) in order to bypass one or two judges whose reputation for severity made them undesirable from the defendant's viewpoint.

On April 3, 1961, the defendant, with the advice of counsel, pleaded guilty to the 32nd count of the indictment. The minutes of the proceedings before Judge Metzner on April 3, 1961 are an exhibit herein. (Exh. D. See Record of hearings upon the present motion, May 1, 1963, p. 43 *et seq.*: Record of May 23, 1963, p. 390). Before accepting the plea of guilty, Judge Metzner searchingly inquired into the pertinent circumstances. Among the questions and answers in the record of the April 3, 1961 proceedings is the following:

> "Q. Has anything been promised or offered you to induce you to change your plea from not guilty to guilty?
>
> "A. No, your Honor."

Upon the hearing of the present motion, the defendant expressly reaffirmed the truthfulness [1583] of his answer to Judge Metzner's question. (Hughes, Record of May 28, 1963, p. 845). However, the defendant claims—and this claim poses another crucial difference between the defense and the Government—that in so answering Judge Metzner's question he understood the question to refer to whether he

had been promised or guaranteed a specific sentence (Hughes, Record of May 28, 1963, pp. 830, 832, 843).

The Government argues that the defendant's unequivocal answer to Judge Metzner's simple and clear question demonstrates that the defendant's current claims are a spurious afterthought.

II.

To determine the merits of the rival contentions of the opposing parties, the Court has conducted a plenary inquiry into the facts and has given comprehensive consideration to such legal authorities as the parties have cited in their memoranda as pertinent to the controlling issues.

The Government concedes that Bolan, the defendant's attorney, told the defendant "whatever the Government told Mr. Bolan" (Record of May 21, 1963, pp. 259, 264, 272, 291, 306-307).

[1584] The defendant does not claim that Mr. Bolan, the defendant's attorney, failed to disclose any material fact to the defendant or that he said or did anything that constitutes incompetence, negligence, or misstatements (Record of May 21, 1963, pp. 270, 280). The defendant, moreover, does not claim that his attorney distorted or exaggerated what the Government told him when he reported the conversations and negotiations with the Government representatives (Record of May 23, 1963, pp. 415, 423, 425, 426).

There is no claim that the defendant was induced to plead guilty by means of any coercion or pressure. It is undisputed that the defendant changed his plea from not guilty to guilty voluntarily, knowledgeably and with the comprehensive advice of his attorney (Record of May 23, 1963, p. 429).

III.

The defendant's attorney and the defendant equivocated between (1) the claim that there had been "repre-

sentations" by Mr. Londin but no promises; (Schachner, Record of May 20, 1963, p. 31); (2) the claim that there had been "promises" (Schachner, [1585] Record of April 26, 1963, pp. 8, 12-13, 14); (3) the claim that there had been neither representations (Schachner, Record of May 1, 1963, p. 37) nor promises but assurances that aroused expectations (Schachner, Record of May 20, 1963, pp. 32-33); and finally, (4) the claim that the defendant's motion should be granted even if there had been no representations.

Thus (Record of 5/23/63, p. 429), Mr. Schachner declared:

> " • • • the plea • • • was induced by a variety of practical considerations. It was in part by representations on the part of the Government which may not have risen on [to] the dignity of what should properly be called promises. At least some of them may not have. I do believe, however, that the prosecuting arm of the Federal Government should live up to an ethics higher than that of the witches in Macbeth who hold out promises to the ear and deny it to the hope. I think expectations were aroused. They were aroused very reasonably."

With reference to Londin's statement [1586] about the Government's statement to the sentencing judge concerning the defendant's cooperation, Mr. Schachner declared (minutes, 5/23/63, pp. 430-431, 432):

> " • • • he said that that was not in the form of a promise; that it was expressly said that nothing could be promised along these lines but that he, Mr. Bolan, could rely on the good faith of the Government."

Defendant's memorandum (filed May 17, 1963), page 3, speaks of "the issue of what *expectations*, they [Government representatives] aroused, what expectations they dis-

appointed and what *expectations* were related to the defendant." (Emphasis added.)

The amorphous character of the defense claims in these respects has required an objective and intensive inquiry into the evidentiary facts.

IV.

To determine whether the defendant should be permitted to withdraw his plea of guilty, the Court will not be governed by the technical concept of "promise" as used in contract law nor by the precise definition of "representation" as [1587] used in tort law.

The controlling desiderata by which the evidence is to be appraised are those embodied in the criteria of the fundamental decency of federal criminal justice. This is the main theme that runs through its verbal variations of good faith, fair play, ethical conduct and due procedural regard for the substantial rights of the defendant.

These criteria are to be applied generously in favor of the defendant in order to afford him the full measure of his constitutional and civil rights and privileges.

It is in conformity with the foregoing principles that the Court has evaluated the proofs.

V.

Throughout the hearing, the defense position was that the cooperation expected of the defendant related only to matters "which were then either under indictment or under investigation." (See, e.g., Record of 5/23/63, pp. 459, 463-467, 486, 560; May 24, 1963, p. 714); "The United Dye Chemical"; "And matters relating to that"; "And anything about the persons who were connected with United Dye."

[1588] However, even the defendant did admit that Londin told him emphatically that "he expected full cooperation * * * that he expected you [the defendant] to

tell the Government everything and anything you knew about United Dye matters and the persons connected with it and anything else in relation to it." (Record of 5/23/63, pp. 467-468.)

In defendant's post-hearing Memorandum In Support of Motion To Change Plea, page 6 defendant's counsel abandoned a restrictive view and finally admitted:

> "It is unnecessary to resolve any possible divergency in the testimony on this score. Certainly, *no experess limitation was put on the extent of Hughes' cooperation.* It would be guibbling to suggest that the subject matter of the proposed cooperation was narrowly circumscribed by implication. Whatever words may have been used, *the defendant may and should be treated as having promised cooperation on all matters concerning which it is within his power to cooperate.*" [1589] (Emphasis added.)

Defense counsel claims that there is an issue, "whether it is fair not to permit a defendant to change his plea if *some mysterious something* in the way of testimony is suddenly expected of him or, rather, cooperation, I should say—it wasn't even suggested that that cooperation take the form of testimony" (Record of May 21, 1963, p. 224). (Emphasis added.)

Defense counsel further argues that even "if there had never been made any representations to the defendant," the defendant should be allowed to withdraw his plea "solely because at the time at which he made his plea [of guilty] he could not conceivably anticipate that in some way *an unmentioned something* would be demanded of him as a token of cooperation; * * * that at that time [when he pleaded guilty] nobody could anticipate that *some such vague thing* might come up. * * * if the defendant at the

time that he made his plea could merely have guessed that *some such thing* would develop in later years, he would not have pleaded guilty * * * it is just terribly unfair to a defendant after securing his cooperation in a long and difficult case to trot out this *Kafka-* [1590] *esque suggestion.* * * * it is an *an undefined suspicion of cooperation about an undefined something.* * * * the unfair conduct of the Government, even assuming that no repudiation was made, or no representations were made. * * * Unfairness in the sense of first securing from the defendant the cooperation in a long trial, arousing in the defendant the expectation that this cooperation would redound to his benefit, thereby assuring that the defendant would not move for immediate sentence, and then using *something* that no one could have anticipated at the time the plea was changed to guilty in some way to reflect on the defendant and to make his position worse in a manner which he couldn't reasonably anticipate. * * * Meaning to use that incident to attempt to secure a harsher sentence than which he might ordinarily have received. * * * they [the Government] refuse to define the matter. * * * it is impossible for him to comply with such a request of the Government. * * * [a request that is] unanticipated and impossible. * * * In an impossible predicament" (Record of May 21, 1963; pp. 225, 227, 228, 229, 234, 235, 236, 237, 238, 239. Record of May 23, 1963, pp. 441-442, 447). (Emphasis added.)

[1591] The defendant's own testimony describes the subject matter concerning which he was asked to cooperate.

On or about February 12, 1963, defendant met with Assistant United States Attorneys Cohn and Walpin; at first Bolan was present but he left and defendant continued with Assistant U. S. Attorneys Cohn and Walpin (Hughes, Record of 5/23/63, pp. 473-474).

The defendant further testified that, at that meeting, Assistant U. S. Attorney Walpin said that his statement

to the sentencing judge "would indicate to the sentencing judge that I [the defendant] had been cooperative or uncooperative and that this statement should indicate their position with respect to what they—how they would like to have my sentence disposed." (Hughes, Record of 5/23/63, p. 519).

The defendant then testified (Record of 5/23/63, pp. 520-521) that he "had been *asked to tell all I [the defendant] knew about the facts leading up to the United Dye indictments. And I said I had told them all the facts about that I know.* He [Walpin] said perhaps I did know *more* than I have told and that *would I tell them all the facts.* I said that I had and that if they asked me specific [1592] questions I will answer them. They said did I [I did] know exactly what they mean, I said that I didn't * * * then we just sat there for about five—or I don't know how much time and Mr. Walpin said that, in substance, of course, 'You know that your co-operation, the extent of your cooperation will be stated to the duly sentencing court,' and that I should consider that whether I'm being cooperative or not and that if I had anything further to tell them or if I was going to get another lawyer, that his office would always be open and that to be free to communicate with him." (Emphasis added.)

The overwhelming weight of the credible evidence establishes:

1. That the Government representatives informed the defense in effect that an Assistant United States Attorney is obligated candidly to advise the sentencing judge on the day of sentence whether the defendant did or did not cooperate with the Government if the defendant was in a position to cooperate by disclosing pertinent evidence or information in compliance with a reasonable and meaningful request;

[1593] 2. That the discussions between the Government representatives and the defense encompassed such cooperation with respect to all areas of official concern to the United States Attorney's Office and was not restricted to the so-called UDY case;

3. That the United States Attorney's Office advised the defense that, if the defendant did cooperate, the extent of such cooperation would be called to the attention of the sentencing judge; that, if the defendant cooperated fully, the United States Attorney's Office would present the pertinent facts of such cooperation without any recommendation but in such a manner as to indicate to the sentencing judge that the United States Attorney's Office was not pressing for a jail sentence; that the nature and extent of any sentence was a matter within the exclusive province of the Court; and that no promise or guaranty of any specific sentence could be given to the defendant;

4. That, so far as concerns the elements necessary for the determination of the present motion, the Government has conducted itself in good faith, fairly and properly in its effort to secure the [1594] cooperation of the defendant; and there is no merit to the defendant's claim that the Government has frustrated his opportunity to cooperate.

To permit a defendant who has pleaded guilty to withdraw his plea merely because he and the United States Attorney disagree over the extent to which he has cooperated or is able to cooperate with the Government, in the circumstances of this case would inject a disruptive element into the judicial administration of criminal justice and create an issue that by its very nature should not be the subject of a plenary hearing.

A full dress trial of a controverted issue whether a defendant, after his guilty plea, has fully cooperated with the United States Attorney in pending inquiries, would require the Court to probe into the executive management

of criminal investigations, grand jury proceedings and matters of administrative judgment. Such judicial intervention (including a hearing) presents the substantial risk of premature disclosure of matters under investigation and the consequent impairment of criminal law enforcement.

Unless necessary to promote the proper [1595] administration of justice or to safeguard a defendant's rights, the Court should not inject itself into the pre-indictment investigative functions of the United States Attorney.

The question of the nature and extent of a defendant's cooperation with the United States Attorney can and should receive due consideration in the proceedings on the defendant's sentencing. At that time both the defendant and his attorney, as well as the United States Attorney, will be given an opportunity to be heard.

VI.

The overwhelming weight of the credible evidence establishes:

1. That there was no assurance, promise or representation on the part of the United States Attorney's Office that the defendant would be given the privilege of obtaining one or more adjournments of the defendant's sentencing in Room 318 in order to bypass one or two judges regarded as undesirable by the defense.

2. That the defendant's guilty plea herein was not induced by any Government assurance, promise or representation relating to adjournments [1596] of the sentencing.

3. That the defendant's present claim (Bolan, Record of May 23, 1963, pp. 338-339) that there was a Government assurance, promise or representation that the defendant would be given such a by-passing privilege is a spurious afterthought first announced by the defense in February, 1963, in order to meet the tactical exigencies of the defense.

Contrary to defense counsel's contention (Post-hearing Memorandum, p. 7, submitted by defendant) that "Londin's testimony agrees substantially with that of Bolan," Londin squarely contradicted Bolan in all critically important respects.

Londin's explicit testimony explodes the defense claim that there was an agreement, representation or assurance that the device of adjournments of the sentencing could be used by the defendant, with the Government's consent, to bypass sentencing judges deemed "undesirable" by the defense.

Thus, Londin testified that almost immediately *after* Bolan said that the defendant would plead guilty, Bolan inquired, "What if I [1597] wanted an adjournment of sentence?" (Londin, Record of May 1, 1963, pp. 58, 65, 117, 118-119).

Londin replied that Bolan "would have to make his application for the adjournment in 318, and if he presented a plausible reason for an adjournment the Government would have no objection * * * to his request for an adjournment for a period of up to one month, and that if at * * * the end of that time, he felt he needed another adjournment he had only to * * * advance a plausible reason to the Court, and the Government would not oppose that request." (Londin, Record of May 1, 1963, pp. 58-59, 65, 88, 107, 108, 127).

Londin further credibly testified:

(1) That whether the requested adjournment would be granted would be left "up to the Court." (Londin, Record of May 1, 1963, p. 91a);

(2) That the conversation he had with Bolan about adjournment of the sentencing was not part of the preceding statement by Bolan that his client would plead guilty (Londin, Record of May 1, 1963, pp. 117-118, 119);

(3) That Londin did not tell Bolan that the Government would not object to several [1598] reasonable adjournments (Londin, Record of May 1, 1963, p. 126);

(4) That Londin never told Bolan that he could have an indefinite number of adjournments in Room 318. (Londin, Record of May 1, 1963, p. 107);

(5) That at no time did Bolan ever tell Londin, in words or in substance, "that he would or might want to get an adjournment of the sentence of the defendant so that he could bypass one or two judges who Mr. Bolan felt might treat his client more severely than other judges." (Londin, Record of May 1, 1963, pp. 106, 113-114);

[1599] (6) That at no time did Londin ever tell Bolan, in words or in substance, that he (Londin) would consent to an application for an adjournment that Bolan might make in Room 318 "in order to enable Mr. Bolan to bypass one or two judges who Mr. Bolan felt might treat his client more severely than other judges." (Londin, Record of May 1, 1963, pp. 107, 114);

(7) That (p. 114)

"There was no discussion of the subject,"—this being in flat contradiction to Bolan's affidavits and testimony upon the present motion;

(8) That Londin never told Bolan, in words or substance, that "if after the case had been set for sentencing in Room 318 the defendant preferred to have the sentencing adjourned to another judge the following month in Room 318 or sometime thereafter, the government would not have any objection to such an adjournment. (Londin, Record of May 1, 1963, p. 114);

(9) That there was absolutely no discussion between Bolan and Londin about the defendant's preference with regard to judges. (Londin, Record of May 1, 1963, p. 115);

(10) That Londin never told Bolan, in words or substance, "that the government had agreed [1600] to permit Hughes not to be sentenced by a judge deemed undesirable from the defendant's standpoint." (Londin, Record of May 1, 1963, p. 115);

(11) That Londin never told Bolan that he could pick the sentencing judge or that he could veto the sentencing judge so that the defendant would be sentenced in the criminal calendar part of this court or that the sentencing would not be referred from the calendar part in Room 318 to another judge. (Londin, Record of May 1, 1963, pp. 87, 88, 93);

(12) That Londin never made any promises to the defendant (Londin, Record of May 1, 1963, pp. 86-87);

(13) That there was no "practice" in the U. S. Attorney's Office to permit a defendant who had pled guilty to adjourn the sentence from time to time. (Londin, Record of May 1, 1963, p. 103);

(14) That Londin's recent conversation with defense and Government attorneys were substantially the same as the statements summarized above. (Londin, Record of May 1, 1963, pp. 70, 71, 110);

(15) That Londin never told Assistant U. S. Attorney Walpin that it was his (Londin's) understanding of his discussion with Bolan that Bolan [1601] was going to be permitted on application in Room 318 to bypass one or two judges who may be unfavorable to the defense. (Londin, Record of May 1, 1963, p. 72);

(16) That Londin does not recall meeting Bolan and talking to him about the defendant in the U. S. Court House on February 26, 1963. (Londin, Record of May 1, 1963, p. 66; Stipulation, Exhibit A, Record of May 20, 1963, p. 21);

(17) That—contrary to Bolan's testimony (Record of May 24, 1963, pp. 588, 606, 607)—Londin never told Bolan

that the referral of the sentencing to this Court was a violation of any understanding between the defense and Government (Londin, Record of May 1, 1963, p. 127; Record of May 24, 1963, p. 624, Exhibit A).

Flatly refuting the defense contention (Schachner, Record of May 23, 1963, pp. 416-417, 419, 434) and Bolan's testimony (Record of May 24, 1963, pp. 665, 666),—Londin testified that the words used by Bolan in speaking to him about the adjournment of the sentence did not have a special significance "among Assistant United States Attorneys and experienced practitioners in this court house" (Londin, Record of May 1, 1963, p. 61).

[1602] The defendant makes much of the following answer of Londin (Record of May 1, 1963, p. 126): "When Mr. Bolan said supposing he wanted an adjournment I thought he might have in his mind that he would want to avoid some particular judge, and to me it didn't matter who sentenced him."

Actually, as the record itself plainly states, all that Londin said was that Bolan, in referring to the subject of possible adjournments of the sentencing, "might" be think of avoiding some particular judge. This is a far cry from the defendant's current transformation of Londin's answer into an alleged agreement or mutual understanding that the device of adjournments would be used to bypass sentencing judges deemed "undesirable" by the defense. Indeed, Londin's testimony explicitly negatives any such alleged agreement or mutual understanding and rebuts any contrary agrumentative "inference" that the defense now conjures up.

Courtroom experience shows that the adjournment of a sentencing "might" be used by a defendant to serve one or more of a variety of purposes completely unrelated to the personality or penological philosophy or reputation of the sentencing judge; [1603] e.g., to enable the defendant to

arrange his business and his financial affairs in contemplation of his anticipated incarceration; or, to enable the defendant simply to delay the day of imprisonment; or, to permit the defendant's lawyer to appear in court on a more convenient day, when he is not elsewhere engaged; or, to enable the defendant to attend a child's graduation or some other family function; or, to enable the defendant to create a situation whereby his children may think he is out of town on a business trip in order to keep them ignorant of their father's imprisonment.

The mere possibility that a defendant's attorney "might" be thinking of utilizing an adjournment (to be granted on the basis of an entirely different and ostensibly valid reason to be presented to the Court) in order to "shop" for another sentencing judge does not transmute the Government's normal statement—that there would be no objection to a request for one or two adjournments for which a plausible reason was presented to the Court—into an extraordinary promise, representation or assurance by the Government that the defendant would have the privilege to bypass one or two judges deemed too harsh by the defendant and thereby to jockey the sentencing before some other [1604] judge more to the defendant's liking.

The convincing character of the Government's evidence that there was no bypassing agreement, representation or assurance is enhanced by the credible evidence that the established policy and practice of the U. S. Attorney's Office are firmly opposed to an arrangement whereby a defendant's attorney would be permitted to obtain adjournments of the sentencing as a stratagem to bypass or select a sentencing judge. (See, e.g., Bolan, Record of May 24, 1963, pp. 726, 742; Walpin, Record of May 28, 1963, pp. 871, 875-880, 883).

The Court rejects as incredible Bolan's testimony (Record of May 24, 1963, pp. 582, 742-743) that Londin told him over the phone on or about February 20, 1963, that the privilege of bypassing or selecting a sentencing judge "was such a simple routine matter that was a courtesy that is always extended to defendants who plead" and that "it was the policy of the United States Attorney's Office to permit this, to permit a bypass of an unfavorable judge."

The incredibility of Bolan's story is again exposed by its own implausibility. This is pointed [1605] up, illustratively, by the correlation of certain salient facts embodied in Bolan's testimony as follows:

Soon after Londin resigned from the U. S. Attorney's Office in June, 1961, Walpin took over the case and met with Bolan and the defendant on or about June 22, 1961. According to Bolan's testimony, at the first meeting of Bolan and Walpin, Walpin discussed "the ground rules". (Record of May 23, 1963, p. 537). In so testifying, Bolan did not refer to the alleged bypassing assurance, agreement or representation.

When specifically questioned by the Court, Bolan added (Record of May 23, 1963, pp. 560-563) that in this meeting with Walpin they discussed the details of the "arrangement with Mr. Londin in accordance with which Mr. Hughes had entered a plea." But they did *not* discuss "the question of the sentencing judge until February, 1963." Bolan further testified that the matter of Room 318, adjournments of sentence, or the sentencing judge was never mentioned by Bolan or any Assistant U. S. Attorney in the presence of the defendant. (Record of May 23, 1963, p. 563).

Walpin and Bolan are in agreement on the highly significant point that, although they discussed "the ground rules", neither Bolan nor Walpin mentioned [1606] the

bypassing agreement allegedly entered into by Londin, Walpin's predecessor in the case.

The very first mention by Bolan to Walpin of an alleged bypassing agreement occurred sometime between February 12th, 1963, and February 20th, 1963. According to Bolan, he telephoned Walpin and told him that he (Bolan) would like the defendant to be sentenced "and at that time I [Bolan] told Mr. Walpin that I had this agreement from the government that I would have the right to bypass an unfavorable judge." (Record of May 23, 1963, pp. 571, 740); "my arrangement with the government is that I have the right to bypass any undesirable judge." (Record of May 23, 1963, p. 576). According to Bolan, Walpin said nothing in response. (Record of May 23, 1963, pp. 577-578).

If there had been a bypassing arrangement agreed on between Londin and Bolan it would have been mentioned in June, 1961, when Walpin, as the Assistant U. S. Attorney newly assigned to the case, had his first meeting with Bolan and they discussed "the ground rules."

In other respects, Walpin's testimony concerning the first meeting with Bolan in June, 1961, materially impugns the credibility of Bolan's recital [1607] of what was said at that meeting. Walpin flatly contradicted Bolan's testimony that they discussed the details of the alleged prior arrangement with Londin in accordance with which the defendant had pleaded guilty. Walpin testified (Record of May 28, 1963, pp. 861-864) that, at that meeting, there was no conversation about the defendant's change of plea; that there was no reference to any prior conversations between Londin and Bolan; that Walpin did not tell Bolan and the defendant that they would have to rely on the good faith of the Government not to prosecute the defendant on other matters and not to press for a jail sentence.

Walpin further testified (Record of May 28, 1963, pp. 862, 863, 890-891) that he told the defendant and Bolan

that he could promise them nothing; that he thought that it was his "obligation as Assistant U. S. Attorney that at the time of sentencing I [Walpin] would inform the sentencing judge of the extent of his [defendant's] cooperation, and I said to him * * * I do not consider this in the nature of a promise, but merely the fulfillment of my obligations as an Assistant U. S. Attorney."

As to the episode in February, 1963, [1608] while Walpin confirms the fact that it was not until February, 1963, that Bolan first asserted the existence of the bypassing agreement, representation or assurance, Walpin contradicts Bolan's version of their conversation and the sequence of events.

Walpin testified (Record of May 28, 1963, pp. 867-870) as to the following facts:

(1) That some time in the middle of February, 1963, he telephoned Bolan and advised him that the Government desired (not that Bolan called him and that Bolan desired) to bring on the defendant's sentencing, the exact date to be set; that Bolan thereupon told Walpin for the very first time, "We had been told before that we could get adjournments for a month at a time *in order to allow us to pick the sentencing judge*" (emphasis added);

(2) That Walpin replied, "I am amazed to hear that, and I find it difficult to believe" [not, as Bolan testified, that Walpin said nothing];

(3) That Walpin also said that he would talk to the assistants who had been in the office at the time and also to those who were still in the office to find out what they have to say about it.

Thereafter, Walpin told Bolan that he had [1609] checked but could find no one who could corroborate Bolan's claimed right to pick the sentencing judge. (Bolin, Record

of May 24, 1963, p. 580; Walpin, Record of May 28, 1963, p. 870). Walpin is corroborated by Londin. Bolan's testimony is incredible.

VII.

A defense contention relates to the circumstances under which the sentencing was referred by Judge Noonan to this Court on April 26, 1963. The defense argues that the Government "circumvented by a scheme" a promise, by having the sentencing referred to this Court; that the sentencing was "maneuvered" by the Government by having it referred to this Court (Schachner, Record of April 26, 1963, p. 13; Record of May 23, 1963, pp. 437-438); that the referral of the sentencing to this Court deprived the defendant of a "privilege"; that the Government has repudiated "representations made to the defendant and his attorney" (Schachner, Record of May 1, 1963, p. 38; Record of May 21, 1963, pp. 216-217, 234).

The Court has found that there never was an assurance, agreement or representation that the defendant [1610] would be permitted to obtain adjournments for the purpose of bypassing or selecting the sentencing judge; and, secondly, the Court has found that the conversation between Bolan and Londin about the possibility of adjourning the sentence was not an inducing cause of the change of plea since it occurred *after* the defense attorney had agreed upon the change of plea (Londin, Record of May 1, 1963, p. 58).

In view of the foregoing, it is immaterial and irrelevant that Judge Noonan, sitting in Room 318, referred the sentencing to this Court upon the application or suggestion of the United States Attorney.

However, in view of the insinuation embodied in the defendant's charge that the referral by Judge Noonan to

this Court was the result of some maneuver or scheme, it is appropriate to make some reference to the evidence that dissipates any innuendo or impropriety or irregularity.

The referral by Judge Noonan of the sentencing to this Court was in accordance with routine and regular procedure (Londin, Record of May 1, 1963, pp. 108-109; Walpin, Record of May 28, 1963, pp. 885-887).

[1611] United States Attorney Morgenthau testified that he never mentioned the defendant nor discussed the defendant or his case with this Court nor did he ever discuss the referral of defendant's sentencing with this Court or with any other judge (Morgenthau, Record of May 28, 1963, pp. 777, 779-780, 782).

The Court itself, in statements on the record, detailed the circumstances under which the sentencing was referred by Judge Noonan to this Court (Record of April 26, 1963, pp. 18-19; Record of May 1, 1963, pp. 39-40, 48-49; Record of May 28, 1963, pp. 781, 793-798).

VIII.

The overwhelming weight of the credible evidence establishes:

1. That the defendant pleaded guilty before Judge Metzner on April 3, 1961, because he felt and knew he was guilty and because, acting on the advice of competent counsel, he concluded it was to his own best interest not to stand trial but to attempt to mitigate or extenuate his guilt by agreeing to cooperate with the Government.

[1612] 2. That neither the defendant nor his attorney has maintained that he is innocent of the charge to which he pleaded guilty (Londin, Record of May 1, 1963, p. 89. Contra: Bolan, Record of May 21, 1963, p. 256; Record of May 23, 1963, pp. 325-326, that, on the contrary, the defendant admitted his guilt not only by pleading guilty

before Judge Metzner but also by reaffirming his guilt in his answer to the specific question put to him by Assistant United States Attorney Walpin in the course of preparing against anticipated cross-examination in the UDY case. (Walpin, Record of May 28, 1963, pp. 866, 892-893. Contra: Hughes, Record of May 28, 1963, pp. 894-895).

3. That nothing was promised or offered to him by the United States Attorney's Office to induce him to change his plea from not guilty to guilty; and that the non-existence of any such promise or offer was specifically and positively affirmed by the defendant's own testimony before this Court (Hughes, Record of 5/28/63, p. 845).

[1613] IX.

A close examination of the record of testimony and exhibits demonstrates convincingly that, on all of the determinative issue, the proofs relied upon by the Government in support of its contentions in opposition to the motion are most persuasive. The Court finds that such proofs are trustworthy and reliable. The Court rejects, as incredible, the evidence relied upon by the defense to establish its version of the material facts.

The defense evidence, in all decisively material respects, was contradicted by the proofs relied upon by the Government, and the ensuing issues of relative credibility are resolved in favor of the Government.

United States Attorney Morgenthau, Chief Assistant United States Attorney Broderick, Assistant United States Attorneys Walpin and Morrison, and former Executive Assistant U. S. Attorney Londin have testified on the hearing herein. The Court accepts their testimony as credible on all material points. To the extent that the defense relies upon contradictory testimony presented by any other witnesses called in behalf of the defendant, such contradictory testimony is rejected [1614] as incredible.

In an attempt to lend an air of verisimilitude to its version of key conversations, the defense utilized certain diary entries and a chronological sequence of events to weave a contrived story of allegedly reconstructed conversations. These conversations, as testified to, which contain varying fractions of the truth but never the whole truth, have been custom-tailored to suit the exigencies of the defense. They are rejected as unworthy of belief.

The sentencing of the defendant had been set down for April 23, 1963. At the request of Mr. Bolan, the sentencing was adjourned to April 29th.

The order to show cause herein was signed on April 26, 1963. Thereafter, the sentencing was adjourned, from time to time, during the course of the hearings on this motion and pending its determination.

Upon the conclusion of the proceedings on this motion, the Court will proceed with the defendant's sentencing.

Whether considered liberally in constitutional terms of due process or similar criteria or in non-constitutional terms of fundamental fairness of federal [1615] crimfinal justice, the rights and privileges of the defendant have not been violated by the Government.

The totality of circumstances developed at the hearing does not present a sound basis for this Court, in the exercise of its discretion, to permit the defendant to withdraw his guilty plea.

The motion to withdraw the plea of guilty and to enter a plea of not guilty is denied. So ordered.

Statutes and Rules Involved

UNITED STATES CONSTITUTION

Amendment V

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

Federal Rules of Criminal Procedure, Rule 32:

"(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Title 28, United States Code:

"§ 455. *Interest of justice or judge*

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

* * * *

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January, one thousand nine hundred and sixty-four.

PRESENT:

HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

PAUL HUGHES,
Defendant-Appellant,

ALEXANDER L. GUTERMA, et al.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk.

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726-519—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 886

PAUL M. HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11–16) is reported at 325 F. 2d 789. The opinion of the district court (Pet. App. 17–38) is reported at 223 F. Supp. 477.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1964 (Pet. App. 40). A petition for rehearing was denied on January 31, 1964. The petition for a writ of certiorari was filed on March 2, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court abused its discretion in denying a motion to withdraw a plea of guilty.

2. Whether the trial judge should have disqualified himself from ruling on the motion to withdraw a guilty plea upon being told that he might be called to testify when in fact he did not become a material witness.

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may be set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner was charged in a thirty-two count indictment returned on November 18, 1960, in the United States District Court for the Southern District of New York with offenses arising under the mail fraud and security fraud statutes (P.A. 128–146).[1] On December 12, 1960, petitioner pleaded not guilty (P.A. 2).

On April 3, 1961, petitioner appeared before the district court with retained counsel to enter a guilty plea to count 32, the conspiracy count. Before accepting

[1] The record on file with the clerk consists of the appendices to the briefs filed in the court of appeals. Petitioner's appendix is designated herein as "P.A." and the government's as "G.A."

the plea, the judge asked petitioner if he had discussed the facts alleged in count 32, and the possible defenses to the charges, with his attorney. He specifically asked petitioner if he knew that he was subject to the same punishment as if he had stood trial and were convicted by a jury. Petitioner said that he had not been promised or offered anything to induce him to change his plea and that the guilty plea was being made as an act of free will. The court then ordered the probation officer to prepare a presentence report and continued the case until May 8, 1961 (G.A. 127–129; P.A. 2). The case was not called for sentencing until February 1963 and then, at petitioner's request, was adjourned to April 1963. After the case was assigned to Judge Herlands for sentencing (P.A. 23–25), petitioner moved to withdraw his guilty plea on the ground that he was led to believe that if he cooperated with the government, it would conduct itself so "as to make likely a more lenient sentence" and would permit him to adjourn the sentencing so that he could bypass judges who might treat him "more severely" than other judges (P.A. 7–10). Upon this motion, the court held six days of hearings (P.A. 5), and thereafter denied his request for relief. On June 21, 1963 petitioner was sentenced to imprisonment for eighteen months (P.A. 125–126).

At the hearing it was shown that, before petitioner's plea of guilty, his retained counsel, Thomas A. Bolan, asked Assistant United States Attorney Jerome J. Londin if the government desired petitioner's cooperation in any governmental investigation. Londin replied he was interested in a group known as Garfield-

Pasternak or United Dye, and Bolan said that petitioner would cooperate. At a second meeting, the government refused Bolan's request that the government file a nolle prosequi with respect to petitioner. In the conversation, Bolan said that petitioner would plead guilty. He then inquired about possible adjournment of the sentencing. The Assistant United States Attorney responded that he should apply for an adjournment in Room 318, the courtroom where the calendar judge sat, that the government would not object to an adjournment of one month if he offered a plausible reason, nor would it oppose a second adjournment (G.A. 4–7, 24–26). Bolan asked whether petitioner would be indicted in any other case. The Assistant replied that, based upon petitioner's cooperation, the Assistant would act in the government's best interest and that petitioner must rely on the Assistant's integrity (G.A. 11–12). The Assistant told Bolan, that, at the time of sentencing, petitioner's cooperation would be called to the attention of the sentencing judge; that while the government would not recommend for or against a jail sentence, if petitioner cooperated fully the government would not press for a jail sentence but that the sentence would be at the discretion of the court (G.A. 12–13).

In June 1961, Assistant United States Attorney Walpin took over the investigation of the United Dye case (*United States* v. *Garfield, et al.*). In June 1962, in the course of preparing against anticipated cross-examination of petitioner in the trial of that case, petitioner reaffirmed his guilt in the present case to Walpin (G.A. 99–100). On February 6, 1963, the

jury verdict was returned in the *Garfield* case (P.A. 90). In the middle of February, Walpin notified Bolan, petitioner's attorney, that the government planned to put petitioner's case on the calendar for sentencing (G.A. 100–101). Bolan informed Walpin that he had been promised adjournments for a month at a time in order to pick the sentencing Judge (G.A. 101). Walpin, who had not handled the case initially, checked and found no such commitment had been made (G.A. 101–104). On February 26, 1963, the judge in charge of the court's calendar assigned the case to Judge Herlands for sentencing on the government's application (P.A. 23–25), because it was part of a series of interrelated indictments (G.A. 2). Walpin had previously ascertained that Judge Herlands was agreeable to its referral (P.A. 90, 100). The judge made a statement to such effect for the record (P.A. 89–90).

On June 21, 1963, when petitioner's case was called for sentencing, the United States Attorney told the court that petitioner's cooperation in *United States* v. *Garfield* was "less than a hundred per cent" and that petitioner was not cooperating in a case then being investigated by the United States Attorney's office (P.A. 101). In sentencing petitioner, the judge said "he is being given full and complete credit, in my judgment, for the cooperation he gave in the case of United States v. Garfield, et al." and noted that he was disregarding the government's claim of lack of cooperation in its pending investigation (G.A. 121–122).

ARGUMENT

1. Petitioner, represented by counsel of his choice, voluntarily and with a full understanding of the consequences, withdrew a previous plea of not guilty and pleaded guilty. This plea was not taken in haste but was entered over three and a half months after the initial arraignment. Petitioner reaffirmed his guilt when he was interviewed in connection with a related case in which he testified. Not until after his own case was set for sentencing, two years after the plea, was there any assertion of innocence on petitioner's part in the motion for withdrawal of the guilty plea, and, even then, no facts were set forth to support the claim.

Under the circumstances, the mere assertion of innocence, so long after the plea, in the context of all the facts that were developed at the hearing, did not require the granting of the motion to withdraw the plea. The record as a whole justified the conclusion that the claim of innocence was belatedly made, not as a *bona fide* assertion of innocence, but because petitioner was fearful a sentence more severe than he had hoped for might be imposed. While a motion to withdraw a plea of guilty will be allowed more freely before sentence than after, there must be more of a showing than was made here to justify setting aside the plea.[2]

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[2] None of the cases cited by petitioner conflict with the ruling below. In *Kadwell* v. *United States*, 315 F. 2d 667 (C.A. 9), the guilty plea was set aside because of the brevity of the defendant's consultation with his court-appointed attorney. In *Poole* v. *United States*, 250 F. 2d 396 (C.A.D.C.), the defendant

2. In the district court, petitioner attempted to show that his attorney had made an agreement with the Assistant United States Attorney which would enable him to choose a lenient judge for sentencing by the device of adjourning his sentence in the calendar courtroom until such time as a favorable district judge was sitting. It was his position, further, that the United States Attorney broke this agreement by causing the assignment of the case to Judge Herlands. The United States denied the existence of such an agreement. Prior to the hearing, petitioner's counsel informed Judge Herlands that he might be called to testify (P.A. 29–30), and, later, counsel said that he thought the judge would be disqualified if he should become a material witness (P.A. 35). Subsequently, at petitioner's request, Judge Herlands declared that he had agreed that the sentencing be referred to him because of his familiarity with the United Dye case (P.A. 89–90).

It is plain the judge was not a material witness. Judge Herlands could have had no part in the events which petitioner set forth as the basis of his motion to withdraw the guilty plea. As the court below found, the information which the judge possessed, and which he stated on the record, was not relevant to the issues at the hearing.

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did not have the assistance of counsel. And in *Gearhart* v. *United States*, 272 F. 2d 499 (C.A.D.C.), the plea was set aside because evidence of psychiatric disorders substantiated the defendant's claim that he was mentally incompetent at the time the crime was committed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Brief for the United States in Opposition to the Petition for Certiorari underscores and compounds the conflict relative to the standard applicable to a motion before sentence to withdraw a guilty plea. The appropriateness of a grant of certiorari to resolve that conflict now becomes even clearer.

1. Reflecting the approach of the Second Circuit, the United States urges (Brief, p. 6) that the plea of guilty was entered voluntarily and with a full understanding of the consequences, and that petitioner later implied he was guilty in an interview with Government counsel. The subsequent claim of innocence, made in connection with the motion to withdraw the guilty plea, is said to be belated and to lack *bona fides* not be-

cause of any finding as to his past or present state of mind but "because petitioner was fearful a sentence more severe than he had hoped for might be imposed" (Brief, p. 6).

In short, the Government merely restates the Second Circuit's view that there must be something more than an assertion of innocence in order to sustain a withdrawal of a guilty plea. All efforts to demonstrate petitioner's honest belief in his innocence, both at the time of entering the plea and at present, were rejected by the courts below.[1] Thus the Government's present

---

[1] The Court of Appeals ruled (Pet., p. 14) that petitioner's present protestations of innocence were properly excluded as "not probative of his former state of mind." And the District Court rejected all efforts of petitioner to prove his belief as to innocence at the time of entering the guilty plea. Thus at R. 949, the court sustained the Government's objection to the following offer of proof:

> "Mr. Schachner: I offer to prove that the witness prior to the change of plea, at the time of the change of plea and thereafter felt innocent of the charge to which he had pleaded guilty and that the sole reasons for his plea of guilty were the fears which had been the subject matter of the previous offer of proof and the statements by the government and by Mr. Bolan, which Mr. Hughes had received."

The court also struck the answer to the following question (R. 592):

> "Q. Mr. Hughes, prior to the time you pleaded guilty to one count of the indictment with which we are concerned, did you feel yourself innocent of the charges? A. Yes, I did.
>
> "Mr. Cohn: Objection, your Honor.
>
> "The Court: Didn't I tell you to wait until the lawyer has a chance to get a ruling from the Court on his objection?
>
> "The Witness: Yes, sir. I thought I had waited.
>
> "The Court: Strike out the answer. Will you repeat the question, Mr. Reporter? (Record read.)
>
> "The Court: Objection sustained."

See also R. 1035.

effort (Brief, p. 6) to suggest that petitioner's claim of innocence lacked *bona fides* is without foundation; no effort was made by the courts below to hear or determine the *bona fides* of the claim of innocence. What is left is a claim by the Government that the law requires some sort of *unfair inducement* underlying the entry of the guilty plea as a condition to withdrawal before sentence.

But to insist on that requirement is to transform a motion to withdraw the plea before sentence into either (a) a motion to withdraw after sentence on grounds of "manifest injustice", or (b) a post-conviction motion under Rule 11 to vacate a guilty plea on grounds of fraudulent inducement, depriving the plea of its necessary voluntariness. No court has ever held that a motion under Rule 32(d) before judgment can be so transformed. And to so hold is to inject a new and confusing standard into the administration of Rule 32(d).

Courts have heretofore held that before sentence a motion to withdraw a guilty plea should be "freely granted" if (a) any reason is presented which is not frivolous and which indicates that it would be "fair and just" to grant the motion and (b) no prejudice to the Government or the courts would result from permitting the defendant to go to trial. See, e.g., *Kadwell* v. *United States*, 315 F. 2d 667, 670, n. 12 (C.A. 9); *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D.C.). Such cases necessarily reject any requirement that the original guilty plea be improperly induced.

Thus it is enough, under the principles followed by those authorities, that this petitioner, asserting his innocence, had reason to believe that the Government

would repudiate an acknowledged representation, on the basis of which petitioner voluntarily entered the plea, whereby petitioner was to cooperate fully in return for a favorable statement by the Government as to that cooperation at the time of sentencing. The dispute that arose as to the extent to which cooperation by the petitioner was possible was left unresolved below, albeit without reflecting upon the *bona fides* of the positions taken by either the Government or the petitioner.[2] Indeed, such a dispute itself would make it "fair and just" to permit a withdrawal. The Government has no vested right in petitioner's guilty plea in these circumstances.

Since the standard to be applied as to motions to withdraw before sentence is of recurring importance in the administration of Rule 32(d) and since this Court has not had occasion since the adoption of that rule to define the standard for pre-sentence motions,[3] certiorari should be granted to dispel the confusion created by the decision below.

2. The United States has not denied the "spectacle of the trial judge presenting testimony," *In re Murchison*, 349 U.S. 133, 139, in a proceeding which finally seals the accused's fate. Nor has the United States answered the incongruity of the trial judge's action in

[2] The District Court's opinion (Pet., p. 25) sets forth the existence and nature of this representation and acknowledges that a *bona fide* dispute arose as to the extent to which petitioner could cooperate. The court refused to adjudicate the dispute since it felt that such an adjudication would "inject a disruptive element into the judicial administration of criminal justice".

[3] Cf. *Kercheval* v. *United States*, 274 U.S. 220, 224, decided before adoption of Rule 32(d), indicating the standard to be applied as to post-sentence motions.

awaiting the outcome of the hearing to determine the materiality of his own testimony. The judge's testimony as to the repudiation of the bypassing "agreement" became immaterial only by virtue of the judge's own finding that petitioner failed to prove the existence of such an "agreement." But the proscription of 28 U.S.C. § 455, disqualifying a judge who "is or has been a material witness," should not depend upon a hindsight view of the proceeding. To avoid the pressures on the judge and to accord the defendant the rights that § 455 was designed to achieve, it should be interpreted to require disqualification whenever it appears before a hearing that the judge's testimony might make him a material witness. See *United States* v. *Halley*, 240 F. 2d 418, 419 (C.A. 2); *United States* v. *Valentino*, 283 F. 2d 634, 636 (C.A. 2).

The intrinsic importance of this issue in the fair administration of criminal justice and the absence of a definitive ruling as to the interpretation to be accorded § 455 under these circumstances make the grant of certiorari appropriate as to this issue.

CONCLUSION

For the reasons expressed in the Petition and in this Reply Brief, the judgment below should be reviewed.

Respectfully submitted,

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PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

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PAUL M. HUGHES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR REHEARING

The petitioner hereby applies for a rehearing of the Order of this Court, dated April 20, 1964, denying his petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit, which affirmed his conviction and sentence for conspiring to violate the federal securities laws, 15 U.S.C. § 77.

REASONS FOR GRANTING REHEARING

The recent decision of the Court of Appeals for the Ninth Circuit in *Zaffarano* v. *United States*, rendered on April 6, 1964, highlights the appropriateness of reviewing the decision below in the instant proceeding.

In *Zaffarana*, the Ninth Circuit affirmed a trial judge's denial of a motion to withdraw a guilty plea prior to sentencing. In so doing, the court ruled:

> "While it is true that leave to withdraw a guilty plea prior to sentencing should be freely allowed, [*Poole* v. *United States*, 250 F. 2d 396, 400 (D. C. Cir. 1957); *Kadwell* v. *United States*, 315 F. 2d 667, 670 (9th Cir. 1963)] the trial court has a wide discretion in passing on such a motion and the reviewing court will not disturb the trial court's ruling in the absence of an abuse of that discretion [*Vasquez* v. *United States*, 279 F. 2d 34, 37 (9th Cir. 1960)] particularly when, as here, the defendant did not allege his innocence of the offense charged. *United States* v. *Norstrand*, 168 F. 2d 481, 482 (2d Cir. 1948)."

In the instant proceeding, however, the courts below have rejected as immaterial all efforts by petitioner to prove his continuing belief in his innocence of the offense charged.[1] They have thereby rejected what this Court in *United States* v. *Norris*, 281 U.S. 619, 623, held was the most basic consideration in permitting an accused to withdraw a formal plea of guilt:

> "The remedy of the accused, *if he thought he had not violated the law*, was to withdraw, by

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[1] In *United States* v. *Norstrand Corporation*, 168 F. 2d 481, 482 (C.A. 2), cited in the *Zaffarano* opinion, the Second Circuit ruled that "When a defendant who has pleaded guilty makes application to withdraw his plea, he should at the very least allege that he was not guilty of the charge to which he pleaded."

> leave of court, the plea of nolo contendere [or of guilty], enter one of not guilty, and, upon the issue thus made, submit the facts for determination in the usual and orderly way." [Emphasis added.]

Petitioner was not only denied the opportunity to demonstrate his belief in his own innocence.[2] He was also denied permission to prove his good-faith performance with respect to cooperating with the Government in the "United Dye" case; that cooperation was concededly the consideration for the Government's representation that it would bring such cooperation to the judge's attention at the time of sentencing. Nor was petitioner permitted to prove that the Government's actual position at the sentencing—a statement that petitioner's cooperation had been "less than a hundred per cent"—was unreasonable or possibly even taken in bad faith.

When the dispute arose concerning the ability of petitioner to cooperate and the petitioner learned that the Government was not going to make a favorable statement at the sentencing, he attempted to withdraw his guilty plea. Yet the ruling below deprived him of all opportunity to explain this dispute and its relationship to the entry of the guilty plea, as well as the opportunity to demonstrate his belief as to innocence.

The ultimate question underlying this case is whether a defendant has any remedy whatsoever under Rule

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[2] The only evidence permitted by the courts below in any way bearing on petitioner's claimed innocence was a statement by the prosecutor that petitioner, during the course of an interview in which he was being coached for his "cooperative" testimony in the "United Dye" trial, had said that if asked at that trial he would admit his guilt. G.A. 99-100. Petitioner was allowed to deny making such a statement, but he was refused all opportunity to show that he believed himself innocent at that or any other time.

32(d) when faced with such a dilemma. That question assumes critical importance because it concerns the waiver of vital constitutional rights by defendants who are thus led into entering pleas of guilty.

The decision below, moreover, is contrary to the *dictum* announced by Judge Learned Hand in *United States* v. *Paglia*, 190 F.2d 445, 447 (C.A. 2), who stated:

> "... if in the case at bar the prosecutor did promise to recommend to the judge sentence of a fixed term, and by means of it induced the plea of guilty, and if upon that plea the judge at the prosecutor's recommendation imposed a substantially higher term, it would follow that Paglia might withdraw his plea, ..."

In *Paglia*, the defendant did not even claim to be innocent. Nonetheless, it was held that he was at least entitled to be resentenced at which time the prosecutor's representation to him would be honored.

Here, petitioner claimed to be innocent. The courts below deemed his claim of innocence immaterial and rejected offers to prove that he believed himself innocent prior to and subsequent to his change of plea. They acknowledged the representation by the prosecutor concerning an expectation of favorable comment to the sentencing judge about the petitioner's cooperation with the Government. However, they ruled that it was within the sole discretion of the prosecutor to determine, however unreasonable that determination may in fact have been, the degree of petitioner's cooperation.

The statements which the prosecutor did make to the sentencing judge, far from being favorable, pictured the defendant as an unrepentant, uncooperative and

obstructive person. A. 101-102. The District Judge treated the issue of cooperation as something that should be taken into consideration in determining the extent of punishment. G.A. 117a-122a. Although the District Judge stated that he would give petitioner full credit for the cooperation he gave in the "United Dye" case and disregard completely any reference to a possible lack of cooperation, the very harsh statement by the prosecutor must have had some effect on the judge. Surely, had the petitioner obtained from the Government the promised favorable statement his position would have been enhanced,

> ". . . for we all know that, although a judge is not bound to accept recommendations, he is extremely likely to be influenced by them." [*United States* v. *Paglia*, 190 F. 2d at 447]

Under these circumstances the defendant ought to have a remedy of some kind.

If the prosecutors here suspected that the petitioner was withholding material information and their suspicions were unfounded, unreasonable, or possibly in bad faith, surely the petitioner should not have been pictured to the sentencing court as an unrepentant, uncooperative criminal.

But what is a defendant's remedy when the Government is about to make a statement about him which is untrue, unfounded, unreasonable and possibly in bad faith, and the Courts do not permit him to show this with competent proof? *A fortiori*, what is a defendant's remedy where the Government agreed to make a favorable statement about him as part of the negotiation that led to his plea of guilty? The Sixth Circuit's answer to this type of question in *Ward* v. *United*

States, 116 F. 2d 135, was to order the trial judge to permit the withdrawal of the guilty plea. That should also be the answer here.

Certainly here a change of circumstances occurred which petitioner could not have foreseen when he pleaded guilty. He had thought that he could cooperate with the Government and that his cooperation would entitle him to be pictured to the sentencing court as a cooperative defendant. Two years after his change of plea he found himself unreasonably suspected of withholding information the nature of which he still does not know or understand. See, 223 F. Supp. at 480-1.

The petitioner in such dilemma should have some remedy and the most obvious remedy lies in Rule 32(d). Petitioner performed his part of the plea-bargain by cooperating with the Government in the "United Dye" trial. The Government cannot be prejudiced by permitting him the opportunity to revert to the *status quo* and withdraw his plea of guilty. See, *Paglia* v. *United States, supra; Ward* v. *United States, supra.*

CONCLUSION

For the reasons set forth above, this Court should grant rehearing.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, being the counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

EUGENE GRESSMAN